[Cite as *State v. Robinson*, 2017-Ohio-8274.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	Case No. 16CA33
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
BRANDON M. ROBINSON,	:	**RELEASED: 09/27/17**
Defendant-Appellant.	:	

APPEARANCES:

R. Eric Kibler, Lisbon, Ohio, for appellant.

Kevin Rings, Washington County Prosecuting Attorney, and Nicole Tipton Coil, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} Brandon Robinson pleaded no contest to one charge of having weapons under disability. He asserts that the trial court erred in denying his motion to suppress the evidence obtained under a search warrant for his home because the state failed to observe the "knock and announce" rule of R.C. 2935.12(A) and relevant constitutional law. We reject Robinson's assertion because even if the state violated the knock and announce rule, courts have uniformly held that the exclusionary rule is inapplicable to violations of that rule. Because Robinson does not cite any persuasive authority to either depart from this precedent or to construe the state constitutional provision more broadly than its similarly worded federal analogue, we overrule his assignment of error.

I. FACTS

{¶2} The Washington County Grand Jury returned an indictment charging Brandon Robinson with three counts of having weapons while under disability;

Robinson entered a plea of not guilty to the charges, after the court denied his motion to suppress.

{¶3} Robinson had filed the motion to suppress the evidence collected by the Washington County Sheriff's Department under two search warrants for his home and person because: (1) the affidavits submitted in support of the search warrants did not establish probable cause for the warrants; and (2) the officers executing the warrants entered his house by force without knocking or otherwise attempting to gain entry.

{¶4} Robinson attached copies of the affidavits and warrants to his motion. Affiant Detective S.D. Parks of the Washington County Sheriff's Department stated that: (1) he investigated a July 19, 2015 invasion by two masked men of a home occupied by James Brookover and Brittany Barnett, resulting in Brookover's assault and the theft of their money, drugs, and property; (2) Brookover stated that he had gotten heroin from Robinson in the past; (3) Brookover still owed Robinson money for drugs from prior transaction(s); (4) Barnett stated that on the night of the break-in, she had been in contact with Robinson's girlfriend for a drug transaction later that evening, but the girlfriend had called to cancel; (5) Robinson and his girlfriend would have known that there was heroin and cash at Brookover and Barnett's residence; and (6) the police conducted a search on Brookover's cell phone, which he had reported stolen by the home invaders, and the last ping from the phone came a few days after the home invasion in a location within 20 to 50 feet of Robinson's driveway.[1]

{¶5} Detective Parks requested warrants to conduct nighttime searches of Robinson's home and person, but did not specify that exigent circumstances warranted

[1] We have paraphrased the content of the affidavits.

waiver of the knock and announce rule. The judge issued the warrants, which stated that "[t]he statutory precondition for non-consensual entry is not waived."

{¶6} Robinson filed his motion to suppress in both this case and in the companion criminal case where he faced charges of complicity in aggravated burglary, complicity in aggravated robbery, and complicity in kidnapping, from the invasion of the Brookover home. That case is the subject of the appeal in *State v. Robinson*, Washington No. 16CA22.

{¶7} The trial court denied the first ground of the motion because it found that "the affidavit establishes probable cause" for the search warrants. The trial court stated that it would not address the second ground of the motion at that time because Robinson's counsel "requested more time to further research the issue and will notify the Court if he wishes to pursue it further." The record in Case No. 16CA22 does not indicate that Robinson ever notified the court that he wished to pursue that claim.

{¶8} The Brookover home invasion case, *State v. Robinson*, Washington No. 16CA22, proceeded to trial where the state introduced the following evidence about the search of Robinson's home. The sheriff's department obtained search warrants for Robinson's home and person (oral swabs for DNA testing) in late July 2015. The special response team for the sheriff's department executed the warrants. They arrived in an armored vehicle, and announced over the vehicle's PA system that they were with the sheriff's office, that they had a search warrant, and that the occupants needed to come out of the house immediately. When ten minutes passed without any response by any occupant, they shot gas rounds into each window of the residence, forcing Robinson out of the house. During the subsequent search law enforcement officers

seized several items, including three firearms that are the subject of the indictment in this case.[2]

{¶9} After Robinson's conviction in case 16CA22, his trial counsel withdrew from this case, and the trial court appointed another attorney. Robinson's replacement trial counsel filed a new motion to suppress, again arguing: (1) the affidavit in support of the search warrant of his home did not establish probable cause for the warrant; and (2) the officers entered his home by force, without knocking or otherwise attempting to gain entry into the home without use of force. He additionally contended that "the statutory preconditions for nonconsensual entry were not waived by the warrant and the Affidavit in support of the warrant is silent on the conditions required for forced entry set out in [R.C.] 2933.231(B)."

{¶10} The state responded to Robinson's new motion by arguing that the trial court had already rejected his first ground in a journal entry addressing prior counsel's similar motion. On the purported violation of the knock and announce rule, the state cited precedent holding the exclusionary rule was not a proper remedy for such a violation.

{¶11} Robinson replied that suppression of the evidence seized in the search of his home was warranted because the state's response failed to establish or articulate any exigent circumstances justifying the forcible entry into his home, which violated R.C. 2935.12 and 2933.231, the Fourth Amendment to the United States Constitution, and Article I, Section 14 of the Ohio Constitution. However, Robinson did not counter the

[2] After the jury convicted Robinson of the complicity charges, the trial court sentenced him to prison and a mandatory term of post-release control.

state's citation of precedent holding that the exclusionary rule was not an appropriate remedy for a violation of the knock and announce rule.

{¶12} The trial court denied the first part of Robinson's motion to suppress based on its prior denial of the same ground—the affidavits provided probable cause for the search warrants. On the no knock issue, the parties agreed that the trial court could consider the testimony from his trial in the companion case 16CA22. Based on that evidence, the court denied the motion without any further evidentiary hearing.

{¶13} Robinson then pleaded no contest to one of the charges of having a weapon while under a disability in return for the dismissal of the remaining two charges. The trial court sentenced him to prison, to be served consecutively to his complicity convictions in the companion case, 16CA22.

II. ASSIGNMENT OF ERROR

{¶14} In his sole assignment of error Robinson assigns the following error:

> THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED IN EXECUTION OF THE SEARCH WARRANT ON DEFENDANT'S HOME, WHEN THE STATE FAILED TO OBSERVE THE "KNOCK AND ANNOUNCE" RULE AS SPECIFIED IN O.R.C. 2935.12(A) AND RELEVANT CONSTITUTIONAL LAW.

III. STANDARD OF REVIEW

{¶15} Robinson contests the trial court's denial of his suppression motion. Appellate review of a trial court's decision on a motion to suppress raises a mixed question of law and fact. *State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, 975 N.E.2d 965, ¶ 6. Because the trial court acts as the trier of fact in suppression hearings and is in the best position to resolve factual issues and evaluate the credibility of witnesses, we must accept the trial court's findings of fact if they are supported by

competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Accepting these facts as true, we must then "independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Hobbs* at ¶ 8, citing *Burnside* at ¶ 8.

IV. LAW AND ANALYSIS

{¶16} Robinson asserts that the trial court erred by denying his motion to suppress the evidence obtained in the search of his home because the state failed to observe the "knock and announce" rule in R.C. 2935.12(A) and relevant constitutional law.

{¶17} In the companion case, Washington No. 16CA22, Robinson invited any potential error in the denial of his original motion because his first trial counsel requested additional time to research this claim but subsequently failed to notify the court he wished to continue to pursue it before the case was tried and concluded. By contrast, Robinson did not abandon this claim here because new trial counsel raised it again in another motion to suppress.

{¶18} The "knock and announce" rule, which is codified in R.C. 2935.12, "directs police officers executing a search warrant at a residence to first knock on the door, announce their purpose, and identify themselves before they forcibly enter the home." *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, 860 N.E.2d 1002, ¶ 9, citing *Wilson v. Arkansas*, 514 U.S. 927, 935-936, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995). However, in *Hudson v. Michigan*, 547 U.S. 586, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), the Supreme Court of the United States held that even if the police violate the knock and announce rule before executing a search warrant, the Fourth Amendment does not

require suppression of the evidence derived from the ensuing search. The Supreme Court concluded that these rules vindicate different interests; the exclusionary rule vindicates the Fourth Amendment's prohibition against the unlawful warrantless search and seizure of evidence, whereas the knock and announce rule vindicates the protection of human life and limb, property, privacy, and dignity. *Id.* at 591-594.

{¶19} Based on *Hudson* several appellate courts, including this one, have held that the federal exclusionary rule does not apply to violations of the knock and announce rule when executing a valid search warrant. *See State v. Eldridge*, 4th Dist. Scioto No. 11CA3441, 2012-Ohio-3747, ¶ 32, quoting *Hudson* at 594 (" 'What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable' " [Emphasis sic.]); *see also State v. Gervin*, 3d Dist. Marion No. 9-15-51, 2016-Ohio-5670, fn. 2, and cases cited). "[T]here is a causal disconnect between the interests served by the knock and announce rule and the remedial objectives achieved by application of the exclusionary rule." *State v. Gilbert*, 4th Dist. Scioto No. 06CA3055, 2007-Ohio-2717, ¶ 38

{¶20} In light of *Hudson* Robinson does not suggest that Fourth Amendment precedent warrants application of the exclusionary rule. Instead, on appeal he argues for the first time that he is entitled to the exclusion of the evidence based on the broader protections of the similarly worded search and seizure provision of Article I, Section 14 of the Ohio Constitution. Robinson cites no appellate court decision that has adopted

that proposition.[3] He does cite the dissenting opinion of Justice Pfeifer in *Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, 860 N.E.2d 1002, for the proposition that the Supreme Court of Ohio has in specific instances held the Ohio Constitution can provide greater protections than its federal counterpart in the areas of individual rights and civil liberties. But in the absence of any specific precedent or persuasive argument for extending Article I, Section 14 of the Ohio Constitution to provide greater protection than the Fourth Amendment in this area, we decline to adopt that approach here.

{¶21} Robinson contends that "it is only through the exclusionary rule" that the knock and announce rule can be given effect. However, the Supreme Court of the United States concluded that, if the officers violated the knock and announce rule in the course of executing a valid search warrant, the victim may file a Section 1983 action for money damages, but may not suppress the evidence because that remedy does not further the interests served by the rule. *Hudson*, 547 U.S. 586, 593, 126 S.Ct. 2159, 165 L.Ed.2d 56; *U.S. v. Smith*, 526 F.3d 306, 311 (6th Cir.2008). Thus, Robinson is not relegated to no remedy for the claimed violation of the rule.

{¶22} Finally, Robinson argues that the trial court erred by failing to conduct an evidentiary hearing on his suppression motion for this issue. However, Crim.R. 12(E) does not require an evidentiary hearing on every motion to suppress; a hearing is required only when the claims in the motion would justify relief and are supported by factual allegations. *See, e.g., State v. Conley*, 8th Dist. Cuyahoga No. 88495, 2007-

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[3] The Supreme Court of Ohio has heard oral argument in a pending case that raises this issue in *State v. Bembry*, 145 Ohio St.3d 1470, 2016-Ohio-3028, 49 N.E.3d 1313, but has not decided that case. Robinson did cite both the federal and state constitutional provisions in his reply to the state's response to his second motion to suppress, but did not counter the state's argument that precedent prohibited the application of the exclusionary rule to any violation of the knock and announce rule in the search of Robinson's home.

Ohio-2920, ¶ 11; *U.S. v. Montgomery*, 395 Fed.Appx. 177, 186 (6th Cir.2010) (a district court need only conduct an evidentiary hearing when the defendant has set forth contested issues of fact that bear upon the legality of a search). There were no disputed facts here—the dispositive issue was whether the exclusionary rule applied to a purported violation of the knock and announce rule. And the parties appeared to stipulate that the trial court could decide this issue based on the testimony adduced at his trial in the companion criminal case before the same judge. There is no indication that Robinson's trial counsel objected to this procedure by requesting an evidentiary hearing in order to present additional facts.

{¶23} Therefore, the trial court did not err by denying Robinson's suppression motion. Even assuming that he established a violation of the knock and announce rule, precedent precluded the application of the exclusionary rule as a remedy for that violation. We overrule Robinson's assignment of error.

V. CONCLUSION

{¶24} Robinson failed to establish that the trial court erred in denying his motion to suppress. Having overruled his assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.